

**Letter of Findings: 09-0564**  
**Sales Tax**  
**For the Years 2003 and 2007**

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**ISSUES**

**I. Sales Tax—Exempt Sales.**

**Authority:** IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-4-1; [45 IAC 2.2-8-12](#).

Taxpayer argues that sales it made to certain customers were exempt from sales tax.

**II. Tax Administration—Statute of Limitations.**

**Authority:** IC § 6-8.1-5-2.

Taxpayer protests the five year tax assessment.

**III. Tax Administration—Negligence Penalty.**

**Authority:** IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of a ten percent negligence penalty.

**STATEMENT OF FACTS**

Taxpayer sells, delivers, and installs property to Indiana customers. After an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer owed additional sales tax and assessed tax, interest, and negligence penalties for the 2003, 2004, 2005, 2006, and 2007 tax years. The Department found that Taxpayer had made a number of sales to Indiana customers without collecting sales tax or obtaining the necessary exemption certificates. Taxpayer protested the tax and penalty assessments. An administrative hearing was held, and this Letter of Findings results.

**I. Sales Tax—Exempt Sales.**

**DISCUSSION**

Taxpayer asserts that sales it made to certain customers were exempt from sales tax. Taxpayer maintains that the sales should be exempt even if Taxpayer has not received an exemption certificate. However, Taxpayer also requests that the Department accept two additional exemption certificates and that the amount of its sales tax assessment be modified to reflect those certificates.

IC § 6-2.5-2-1(a) imposes sales tax on retail transactions made in Indiana. IC § 6-2.5-1-2 defines a retail transaction as "a transaction of a retail merchant that constitutes selling at retail as described in IC § 6-2.5-4-1... or that is described in any other section of IC § 6-2.5-4." IC § 6-2.5-4-1(a) provides that "[a] person is a retail merchant making a retail transaction when he engages in selling at retail." IC § 6-2.5-4-1(b) further explains that a person sells at retail when he "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration."

During the audit, Taxpayer was unable to provide a number of exemption certificates. The auditor was therefore unable to verify that those sales were exempt from the sales tax. The relevant regulation is [45 IAC 2.2-8-12\(b\)](#) which states, "Retail merchants are required to collect sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used for an exempt purpose."

The regulation cautions that, "Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important to the seller to obtain an exemption certificate in order to avoid the necessity for such proof." [45 IAC 2.2-8-12\(d\)](#).

There is no question that Taxpayer entered into retail transactions for which – absent an exemption – Taxpayer was required to collect sales tax. Taxpayer's protest is denied to the extent that it was unable to provide an exemption certificate. However, Taxpayer has somewhat belatedly supplied exemption certificates from its customers for certain of its sales. Therefore, the Department is prepared to accept the exemption certificates, and the Audit Division is requested to review the audit report and make whatever adjustments it deems appropriate but with one cautionary word. Taxpayer is reminded that sales tax becomes due at the time of the transaction; either the purchaser is exempt at the time of the transaction or it is not exempt. If the purchaser claims an exemption, the exemption certificate should be obtained at the time the transaction occurs otherwise the burden of proving the transaction was exempt becomes measurably more difficult.

**FINDING**

To the extent that Taxpayer has provided exemption certificates from its customers, Taxpayer's protest is sustained.

**II. Tax Administration—Statute of Limitations.**

**DISCUSSION**

Taxpayer protests the Department's five year tax assessment and invites the Department to reduce the assessment to the three years, the general statute of limitations, as a matter of fairness. Nonetheless, the Department declines Taxpayer's invitation. Pursuant to IC § 6-8.1-5-2(f), when a person fails to file the tax return(s), there is no statute of limitations for the Department to issue its proposed assessment. Since Taxpayer was a non-filer for the tax years at issue, the Department's assessment of tax for five years is in accordance with the Department's statute of limitations for assessments.

#### **FINDING**

Taxpayer's protest is respectfully denied.

### **III. Tax Administration–Negligence Penalty.**

#### **DISCUSSION**

The Department issued proposed assessments and the ten percent negligence penalty for the tax years in question. Taxpayer protests the imposition of penalty. The Department refers to IC § 6-8.1-10-2.1(a)(3), which provides, "[I]f a person... incurs, upon examination by the department, a deficiency that is due to negligence... the person is subject to a penalty."

[45 IAC 15-11-2](#)(b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at [45 IAC 15-11-2](#)(c) as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

Taxpayer has provided sufficient information to establish that its failure to pay the deficiency in this instance was not due to Taxpayer's negligence, but was due to reasonable cause as required by [45 IAC 15-11-2](#)(c). While Taxpayer's current circumstances show that Taxpayer acted with reasonable cause, Taxpayer should be on notice that should these circumstances arise again, penalty waiver may not be warranted.

#### **FINDING**

Taxpayer's protest is sustained.

#### **CONCLUSION**

Taxpayer's protest is sustained as to Issue I; considering the exemption certificates offered by Taxpayer, the Audit Division is requested to make whatever adjustments it deems appropriate. Taxpayer's protest is denied as to Issue II for the five year assessment. Taxpayer's protest is sustained as to the imposition of penalty as discussed in Issue III.

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